IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-782

GATEWAY COAL COMPANY,

*Petitioner,*

vs.

UNITED MINE WORKERS OF AMERICA, et al.,

*Respondents.*

## BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Respondents, UNITED MINE WORKERS OF AMERICA and DISTRICT NO. 4, UNITED MINE WORKERS OF AMERICA, oppose the Petition for Writ of Certiorari and herein present arguments in opposition.

## COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

In an action wherein employees quit their labor in good faith because of abnormally dangerous conditions for work at the place of employment of such employees, and the Court finds objective evidence of such dangerous conditions and that there is no basis in the record for a finding that the employees did not honestly believe that their lives were unduly endangered, and the Court further finds that the contract involved does not require the arbitration of safety disputes, is not the Court of Appeals correct in reversing the District Court and remanding the case with directions that the preliminary injunction issued be dissolved?

## COUNTER STATEMENT OF THE CASE

On June 28, 1971, the United States District Court for the Western District of Pennsylvania issued a preliminary injunction enjoining Respondents from engaging in any work stoppage at Petitioner's Gateway Mine. The injunction further required Respondents to arbitrate the issue of whether two assistant mine foremen, previously suspended by the Company, could be returned to work prior to the adjudication of criminal charges preferred by a state mine inspector for making false entries in mine ventilation records. (R. pp. 221-225). [1] For reasons explained below, the United States Court of Appeals for the Third Circuit reversed the decision of the District Court and ordered the case remanded for a vacating of the preliminary injunction. A Petition for Rehearing was denied. The petition followed.

The Gateway mine is a very large mine located in Greene County, Pennsylvania, and employs approximately 550 miners. (R. pp. 10-11). The Gateway mine liberates approximately 4 million cubic feet of methane gas every twenty-four hours (R. p. 16) as a result of which it is classified as "especially hazardous" by the United States Department of Interior, Bureau of Mines. (R. p. 80).

As an "especially hazardous" mine, the Gateway mine is subject to unannounced spot inspections by Federal mine in-

1. For the convenience of the Court, all page references to the record in this Brief will be to the Appendix filed by Local 6330 in the United States Court of Appeals for the Third Circuit and will be designated as "R. p.____".

spectors no less often than once every five days under the Federal Coal Mine Health & Safety Act of 1969, 30 U.S.C.A. § 813(i).

On the morning of April 15, 1970, the men working in the area of the mine designated "three butt", located approximately two thousand feet from the surface, noticed that the quality of air in their area was impaired. An air reading taken by the foreman in charge revealed that the air flow had dropped to less than 40% of the level established by the Gateway safety engineer. (R. pp. 15, 65-66).

The maintenance of proper ventilation is of critical importance to the underground coal miner to safeguard against the danger of gas and dust explosions. (R. pp. 64-65). The radical reduction in air flow was therefore an extremely serious problem. Electrical power in the area was shut off and men were dispatched from the surface to locate the problem. (R. pp. 18 & 74).

Approximately one hour following the discovery of the air problem in the "three butt" area, the fan attendant in the course of his regular inspection of fan instruments discovered that air pressure at one of the mine's four fans had dropped twenty-five per cent. Alerted by this discovery that the ventilation problem affected the entire mine, the Company ordered all power disconnected and all men withdrawn from the mine. (R. pp. 18-19).

Further investigation revealed that the ventilation failure resulted from a short circuit in the system caused by a fallen overcase which had fallen at approximately 4:00 o'clock a.m. on April 15. (R. p. 14). The investigation also revealed that the three foremen who, pursuant to the specific mandates of Federal and state law, conducted the pre-shift inspection of the mine to check for proper ventilation and accumulations of methane gas had recorded normal air readings in the mine record book well after the time the overcast fell. (R. pp. 22, 54-55, 152-53, 155). As a result of this discovery of an obvious falsification of mine records, the state mine inspector seized the mine records in question and subsequently filed criminal charges against the three foremen in question for falsifying mine records. (R. p. 98).

A special meeting of Local 6330 was held on Sunday, April 18, 1971. The local union's mine safety committee, which had requested the prior day's special inspection by Federal and State inspectors, reported the results of that inspection to the membership. The membership knew that normal mining operations continued in the mine for a period of three and one-half hours after ventilation had been impaired by the fallen overcast. During this period of time when reduced ventilation allowed increased accumulations of dust and methane gas, a cutting torch had been in use in one of the sections of the mine. (R. pp. 152-53). The membership was also aware of the fact that each of the three foremen involved had previously been brought to the attention of the Local Union as unfit to carry out supervisory duties (R. p. 137) and had been censured by the Local Union or the Company for unsafe practices. (R. pp. 142, 154, 160-161).

As a result of the report of the safety committee concerning the falsification of mine records and the prior history of the foremen in question, a motion was made not to return to work with these foremen for the reason that to do so would jeopardize the safety of the men. (R. pp. 133-34, 157). Approximately 200 to 225 members of Local 6330 were in attendance at the special meeting. (R. pp. 136, 154). The motion was adopted unanimously. (R. p. 137). Four members of Local 6330 who attended the special meeting testified before the District Court. Each member who testified explained that he voted for the motion because he considered the mine unsafe with the foremen in question again in positions where their conduct could jeopardize the safety of the men in the mine. (R. pp. 133-34, 142, 152-55, 162). All three Local Union members who were asked, further testified that they had consistently refused to work with these foremen since first learning of the falsified records at the special meeting. (R. pp. 148, 157, 165).

The members of Local 6330 returned to work on April 19, 1971, when the Company agreed to suspend the foremen involved until such time as legal proceedings involving the foremen were concluded. On May 29, 1971, the Company received a copy of a letter directed to Local Union 6330. In that letter the Pennsylvania Department of Environmental Resources noted that criminal charges had been filed against the foremen in question and concurred in that action. In light of that pending criminal action and the department's view that the purpose of the penalty section of the State mining law was

to punish violators of the law to the extent deemed appropriate by the judiciary, the Department stated that it would not seek to decertify the foremen in question. (R. p. 212). Two days after receiving the letter and on the eve of resumption of mining operations following the Memorial Day holiday, the Company reinstated the foremen. The men refused to enter the mine knowing that they thereby disqualified themselves for holiday pay. (Ap. p. 97).

Following this cessation of operations, the Company sought and obtained a preliminary injunction requiring the members of Local 6330 to return to work and requiring Respondents to arbitrate the safety dispute which gave rise to the work stoppage. However, the Court conditioned the injunction on the continued suspension of the foremen pending arbitration.

The Court of Appeals reversed and remanded the case for vacating of the preliminary injunction. The Court of Appeals properly held that disputes involving safety of the place and circumstances in which employees are required to work are of a special and distinguishing character. It noted that an enlightened society should not require men to submit matters of life or death to arbitration under circumstances where the men and not the arbitrator must stake their lives on the arbitrator's decision.

In addition, the Court of Appeals after reviewing the contract and evidence, found that the contract did not provide for compulsory arbitration of safety disputes and that the foremen had been guilty of significant dereliction. The Court further found that the contract requires the Company to comply with the recommendations of the mine safety committee, that the union membership meeting, a body superior to that committee, had unanimously voted to stay out of the mine because of a particular hazard, and that there was no finding or basis for a finding in the record that the miners did not honestly believe that their lives were unduly endangered so long as the foremen in question were responsible for safety procedures.

The Petition for Writ of Certiorari followed.

## ARGUMENTS AND REASONS WHY THE WRIT SHOULD BE REFUSED

1. The Company argues that the decision of the Court of Appeals conflicts with the Federal labor policy favoring arbitration of industrial disputes. The Company erroneously reads the Court's decision as stating that all safety disputes under all circumstances may not be arbitrated and then argues that such a holding conflicts with Section 203(d) of the Labor-Management Relations Act and the decisions of this Court in the Steelworkers trilogy.

In Steelworkers vs. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) this Court ruled that Federal courts should order specific performance of arbitration agreements even where the grievance involved the contracting out of work and the contract excluded from arbitration matters which were strictly a function of management. The Court announced a broad presumption in favor of arbitration.

In Steelworkers vs. American Mfg. Co., 363 U.S. 564 (1960), this Court ruled that when parties had agreed to submit all questions of contract interpretation to the arbitrator, the function of the court is limited to determining whether the claim on its face is governed by the contract. In such cases, the courts should not weigh the merits but refer even frivolous claims to arbitration.

In these two cases as in Steelworkers vs. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) this Court, in conformity with the statutory mandate, established arbitration as the keystone of Federal labor policy. Yet in each case, this Court indicated that its decisions were based on the contractual consent of each of the parties to utilize arbitration to settle specific disputes. Arbitration cannot be imposed on parties who have not bargained for and accepted it. Thus, the rule enunciated in Steelworkers vs. American Mfg. Co., applies "when the parties have agreed to submit all questions of contract interpretation to the arbitrator." 363 U.S. at 567-68. It is not arbitration per se but "the means chosen by the parties for settlement of their differences under a collective bargaining agreement" (363 U.S. 564, 566) which must be given full pay. To be sure doubts are to be resolted in favor of coverage, but it is equally true that "arbitration is a matter of contract and a party cannot

be required to submit to arbitration any dispute which he has not agreed so to submit". Steelworkers vs. Warrior & Gulf Navig. Co., 363 U.S. at 582. Section 203(d) declares that public policy favors settlement of disputes "by method agreed upon by the Parties".

In the case at bar, the Court of Appeals found that safety disputes are not within the ambit of the arbitration provisions of the National Bituminous Coal Wage Agreement of 1968. The Court of Appeals noted that the collective bargaining agreement,

> specifically provides that, regardless of the views or judgement of the operator, a mine must be closed if the mine safety committee of the local union finds it immediately dangerous. And, in this case, a union membership meeting, the body superior of the mine safety committee, unanimously voted to stay out of the mine because of a particular hazard.
>
> Petition, Appendix C, p. 15a.

Moreover, the prior practice of the parties, as testified to by both company and union witnesses, indicated that safety disputes were not arbitrable.

The Petitioner's argument that this decision prevents parties from arbitrating safety disputes arising under recent Federal industrial safety legislation in spurious. It completely disregards the Court of Appeals findings that the safety dispute in question is not arbitrable because of the terms of the 1968 Contract and the history of its implementation. Clearly, where parties agree to arbitrate safety, the Federal courts may enforce that agreement. The Court raises but does not decide the question of whether a work stoppage over such a dispute is enjoinable and, in so doing, implies that at the very least such a dispute would be arbitrable.

Rather than conflicting with Federal labor policy and the decisions of this Court, the decision of the Court of Appeals is in conformity with that authority. After reviewing the 1968 Contract, the Court ruled that safety disputes are not arbitrable under its now expired and superceded provisions. Both the contractual exclusion and the Court's review of the contract to determine arbitrability are in harmony with Federal labor law and the decisions of this Court.

2. Similarly, Petitioner's argument that the Court of Appeals' decision conflicts with the decision of this Court in Steelworkers vs. Enterprise Wheel & Car Corp., supra, is without foundation. The Court of Appeals did not decide the merits of the dispute and impose its judgment over that of the Umpire. On the contrary, the Court ruled that safety disputes were excepted from the arbitration clause of this contract and thus an arbitrator was without power or authority to decide the dispute. The Court's ruling did not concern itself with the merits of the dispute. It reversed a preliminary injunction ordering a dispute to arbitration on the grounds that the parties had not agreed to arbitration of the dispute involved.

3. Petitioner's third argument attempts to demonstrate a conflict between the decision of the Court of Appeals and the decision of this Court in Boys Markets, Inc. vs. Retail Clerks Union, 398 U.S. 235 (1970). Once again, however, Petitioner misstates the holding of the Court of Appeals. In at least two points in its Petition, the Petitioner argues that the Court of Appeals held that a strike over a safety dispute is not enjoinable or, alternatively, that Boys Markets is limited in its application to an economic dispute not involving safety. (Petition, pp. 16 & 18, fn. 7).

The Company bases its assertions on footnote 1 to the Court's decision. (Petition, Appendix C p. 18a, fn. 1). That footnote and the text to which it is tied read as follows:

> For these reasons the present contract should not be construed as providing for compulsary arbitration of safety disputes. [1]
>
> [1] This conclusion makes it unnecessary to discuss Boys Market, Inc. vs. Retail Clerk's Union, 1970, 398 U.S. 235, upon which appellee places great reliance. For that decision is grounded upon a finding that an economic dispute, not involving safety, was subject to compulsory arbitration under the employees' labor contract.
>
> It is also unnecessary to decide whether, in the unlikely case of a contract specifically declaring that safety disputes are subject to compulsory arbitration, a work stoppage over a safety dispute would be enjoinable. (Petition, Appendix C, p. 18a).

This text and footnote make it clear that the Court does not hold that a strike over any safety dispute is not arbitrable or that Boys Markets is limited in its application to economic disputes. The holding is that under the present contract safety disputes are not arbitrable. Boys Markets is never reached because it is based on a strike over an arbitrable dispute. This decision does not decide the question of a safety strike in the context of a contract providing for the arbitration of such disputes. No conflict is present.

Nor, as Petitioner argues, will this decision have a devastating effect on the stability of labor relations. Employees have been guaranteed the right to cease working because of a good faith belief that working conditions are abnormally dangerous since 1947 with no such devastating effect. This codification of a natural right is further enforced by the Congressional finding that "the first priority and concern of all in the coal mining industry must be the health and safety of its most precious resource - the miner". Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C.A. §801. The Court of Appeals has ruled that the 1968 contract did not provide for arbitration of safety disputes. It did not hold that safety disputes may not be arbitrated. This Court may at some appropriate time wish to review the interplay of Section 502 and its decision in Boys Markets. However, inasmuch as the case at bar involves a contract which does not make safety disputes subject to arbitration and, as such, is not within the ambit of this Court's consideration in Boys Markets, this is an inappropriate case for review of this subject.

4. Petitioner's final argument is that the decision raises a vital question concerning the interpretation of Section 502 of the Labor-Management Relations Act. In accordance with the dissent of Judge Rosenn, Petitioner argues that the majority has departed from prior interpretations of Section 502 which require ascertainable objective evidence of the abnormally dangerous conditions.

It is respectfully submitted that Judge Rosenn and Petitioner have misread the majority's opinion and have overlooked the findings on which it is based. Thus, it was undisputed that, at the time of the incident in question, the flow of air in the mine had dropped to less than forty per cent of the level established by the Company's safety engineers. It was undisputed that this

condition was caused by a partial blockage of an air intake and that the consequence of such a drop in ventilation was the potentially dangerous increased accumulations of dust and flammable gas with the consequent increased risk of explosion. It was also undisputed that the foremen in question, who had previously been the subject of Company or union reprimand for safety violations, had made false entries in the mine ventilation records. The Court found that these foremen had been guilty of significant dereliction. It noted that they had pleaded nolo contendere to the criminal charges filed against them.

Section 502 states:

> . . . nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act.

The plain meaning of this language is that an employee who in good faith ceases work because of abnormally dangerous conditions has not engaged in a strike. In determining whether a work stoppage is protected by Section 502, a court must determine that conditions at the place of employment are abnormally dangerous and that the employees stopped work in good faith over these conditions.

In the case at bar, the Court of Appeals made both findings. The Court stated:

> any failure of responsible supervisors to perform their assigned duty to check air flow in a mine and to record and immediately report any significant diminution can cause the death of many men. In such circumstances, a single negligent failure to take a required safety precaution may reasonably be viewed as intolerable by those whose lives are at stake.
>
> Petition, Appendix C. P. 16a.

This language makes it clear that the majority agreed that the presence in the mine of foremen, who had been criminally negligent in carrying out their obligations to safeguard the work force from potentially catastrophic explosions, rendered working conditions in the mine abnormally dangerous. The Court further stated:

> there is no finding, indeed no basis for a finding in this record that the miners did not honestly believe that their lives were unduly endangered so long as the foremen in question were responsible for safety procedures.
>
> Petition, Appendix C. p. 14a.

Thus the Court found that conditions in the mine were abnormally dangerous and that the employees had ceased work in good faith because of those conditions.

Similarly, in U.S. Steel Corp. vs. United Mine Workers, Nos. 71-1974/75 (3rd Cir., filed November 6, 1972), the Court of Appeals found that, in deciding to cease work because of abnormally dangerous conditions, "the miners reached a conclusion which the district court could not say was unjustified". The decision of the Court of Appeals in Gateway Coal Co. vs. United Mine Workers is in confirmity with prior interpretation of Section 502.

## CONCLUSION

For all of the reasons set forth above, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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